

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARL YOUNG,) No. C 09-1042 JSW (PR)
Plaintiff,)
) **ORDER OF SERVICE AND**
) **DIRECTING DEFENDANTS TO**
) **FILE DISPOSITIVE MOTION OR**
) **NOTICE THAT SUCH MOTION IS**
) **NOT WARRANTED**
v.)
) (Docket No. 2)
T. HOLMES, M. BULLOCK, K.)
KIPLINGER, and T. BUCHANAN,)
Defendants.)

INTRODUCTION

Plaintiff, a prisoner of the State of California currently incarcerated at Pelican Bay State Prison, filed this pro se civil rights complaint under 42 U.S.C § 1983 alleging that Defendants Holmes, Bullock, Kiplinger and Buchanan used excessive force against him. Plaintiff's motion to proceed *in forma pauperis* is GRANTED (docket no. 2) in a separate order filed simultaneously. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves certain claims as set forth below.

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a

1 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
 2 liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
 3 1990).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
 5 (1) that a right secured by the Constitution or laws of the United States was violated, and
 6 (2) that the alleged violation was committed by a person acting under the color of state
 7 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

8 Having reviewed the complaint, the Court finds Plaintiff’s allegations, when
 9 liberally construed, state a cognizable claim that the named Defendants violated his
 10 constitutional rights by using excessive force against him. Accordingly, the claims
 11 against these Defendants will be served, as set forth below.

12 CONCLUSION

13 For the foregoing reasons, the Court orders as follows:

14 1. The Clerk of the Court shall issue summons and the United States Marshal
 15 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,
 16 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a
 17 copy of this order upon: **Officers T. Holmes, M. Bullock, K. Kiplinger and T.**
 18 **Buchanan at Pelican Bay State Prison.** The Clerk shall also mail a courtesy copy of
 19 the Complaint, all attachments thereto, and this order to the San Francisco City
 20 Attorney’s Office and serve a copy of this order on Plaintiff.

21 3. No later than **sixty (60) days** from the date of this order, Defendant shall either
 22 file a motion for summary judgment or other dispositive motion, or a notice to the Court
 23 that he/she is of the opinion that this matter cannot be resolved by dispositive motion.
 24 The motion shall be supported by adequate factual documentation and shall conform in
 25 all respects to Federal Rule of Civil Procedure 56.

26 a. If Defendant elects to file a motion to dismiss on the grounds that

1 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
2 § 1997e(a), Defendant shall do so in an unenumerated Rule 12(b) motion pursuant to
3 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

4 b. Any motion for summary judgment shall be supported by adequate
5 factual documentation and shall conform in all respects to Federal Rule of Civil
6 Procedure 56. **Defendant is advised that summary judgment cannot be granted, nor**
7 **qualified immunity found, if material facts are in dispute. If Defendant is of the**
8 **opinion that this case cannot be resolved by summary judgment, she/he shall so**
9 **inform the Court prior to the date the summary judgment motion is due.**

10 All papers filed with the Court shall be promptly served on the Plaintiff.

11 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
12 served on Defendant no later than **thirty (30) days** from the date Defendant's motion is
13 filed.

14 a. In the event the Defendant files an unenumerated motion to dismiss
15 under Rule 12(b), Plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d
16 1108, 1119-20 & n.4 (9th Cir. 2003):

17 If defendants file an unenumerated motion to dismiss for failure to
18 exhaust, they are seeking to have your case dismissed. If the motion is
19 granted it will end your case.

20 You have the right to present any evidence you may have which
21 tends to show that you did exhaust your administrative remedies. Such
22 evidence may be in the form of declarations (statements signed under
23 penalty of perjury) or authenticated documents, that is, documents
24 accompanied by a declaration showing where they came from and why
25 they are authentic, or other sworn papers, such as answers to
interrogatories or depositions.

26 If defendants file a motion to dismiss and it is granted, your case
27 will be dismissed and there will be no trial.

28 b. In the event Defendant files a motion for summary judgment, the Ninth
Circuit has held that the following notice should be given to pro se Plaintiffs:

The defendants have made a motion for summary judgment by
which they seek to have your case dismissed. A motion for summary
judgment under Rule 56 of the Federal Rules of Civil Procedure will, if

1 granted, end your case.

2 Rule 56 tells you what you must do in order to oppose a motion for
 3 summary judgment. Generally, summary judgment must be granted when
 4 there is no genuine issue of material fact--that is, if there is no real dispute
 5 about any fact that would affect the result of your case, the party who
 6 asked for summary judgment is entitled to judgment as a matter of law,
 7 which will end your case. When a party you are suing makes a motion for
 8 summary judgment that is properly supported by declarations (or other
 9 sworn testimony), you cannot simply rely on what your complaint says.
 Instead, you must set out specific facts in declarations, depositions,
 answers to interrogatories, or authenticated documents, as provided in Rule
 56(e), that contradict the facts shown in the defendants' declarations and
 documents and show that there is a genuine issue of material fact for trial.
 If you do not submit your own evidence in opposition, summary judgment,
 if appropriate, may be entered against you. If summary judgment is
 granted in favor of defendants, your case will be dismissed and there will
 be no trial.

10 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 11 read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477
 12 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
 13 evidence showing triable issues of material fact on every essential element of his claim).
 Plaintiff is cautioned that failure to file an opposition to Defendant's motion for summary
 14 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
 15 granting of judgment against Plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,
 16 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

17 5. Defendant shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
 18 opposition is filed.

20 6. The motion shall be deemed submitted as of the date the reply brief is due. No
 21 hearing will be held on the motion unless the Court so orders at a later date.

22 7. All communications by the Plaintiff with the Court must be served on
 23 Defendant, or Defendant's counsel once counsel has been designated, by mailing a true
 24 copy of the document to Defendants or Defendant's counsel.

25 8. Discovery may be taken in accordance with the Federal Rules of Civil
 26 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or

1 Local Rule 16-1 is required before the parties may conduct discovery.
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3 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
4 Court informed of any change of address and must comply with the court's orders in a
5 timely fashion. Failure to do so may result in the dismissal of this action for failure to
6 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

7 This order terminates Docket No. 2.
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9 IT IS SO ORDERED.
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11 DATED: June 30, 2009

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14 JEFFREY S. WHITE
15 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

EARL YOUNG,

Case Number: CV09-01042 JSW

Plaintiff,

CERTIFICATE OF SERVICE

V.

T. HOLMES et al.

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 30, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Earl Young
V06022
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95331

Dated: June 30, 2009

Jennifer Ottolini
Richard W. Wiking, Clerk
By: Jennifer Ottolini, Deputy Clerk

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